Nos. 75-1097 and 75-1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

SOUTH PRAIRIE CONSTRUCTION CO., *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
and
NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR LOCAL 627, IUOE IN OPPOSITION

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005
MICHAEL FANNING
1125 Seventeenth Street, N.W.
Washington, D.C. 20036
LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Local 627, IUOE

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.
9

13858-4-76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1097

SOUTH PRAIRIE CONSTRUCTION CO., *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD.

No. 75-1243

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR LOCAL 627, IUOE IN OPPOSITION

1. *The Background.* The Court of Appeals identified the parties to this controversy and stated in summary form the genesis of the dispute between them:

> "Peter Kiewit Sons' Co. ('Kiewit') and South Praire Construction Co. ('South Prairie') * * *

are wholly-owned operating subsidiaries of Peter Kiewit Sons', Inc. ('Kiewit, Inc.') * * *. For many years, Kiewit was engaged in construction work, including heavy and highway construction in Oklahoma * * *. Local 627 has represented Kiewit's employees continuously since 1960. [Kiewit and Local 627, International Union of Operating Engineers were parties to a collective agreement] effective between July 1970 and 1973 * * * covering heavy and highway construction. Kiewit was the only highway contractor in Oklahoma to have a signed agreement with a union, and its wage costs were higher than those of its competitors * * *. Kiewit, Inc. [therefore] decided that [its subsidiary] South Prairie, a * * * contractor [which Kiewit, Inc. had determined would operate on a non-union basis and which had] engaged for many years in heavy and highway construction work outside Oklahoma, should be activated in Oklahoma * * *. On or about February 25, 1972 [South Prairie] began doing business [in Oklahoma] as a highway contractor.

"Commencing in March 1972, Local 627's business agent, Ellis, * * * sought unsuccessfully to have Kiewit and South Prairie agree to apply the Union's agreement with Kiewit to South Prairie's work. On June 20, 1972, the day South Prairie bid on four Turnpike Authority jobs, Local 627 filed the [refusal to bargain] charge that led to the proceedings below." (Co. Pet. App. pp. 2a-5a, 8a.) [1]

[1] South Prairie Construction Co. is the petitioner in No. 75-1097. Its petition is referred to herein as "Co. Pet.", and the Appendix to its petition is referred to as "Co. Pet. App.". The National Labor Relations Board is the petitioner in No. 75-1243. The NLRB's petition is referred to herein as "Bd. Pet." The decisions below are set out at Co. Pet. App. pp. 1a-88a.

2. *The Decision Below.* The Court of Appeals stated the "key issue" to be "whether, for purposes of the National Labor Relations Act, Kiewit and South Prairie are separate employers, as determined by the Board, or a 'single employer', as determined by the ALJ [Administrative Law Judge]." Consequently, that court recognized that the "controlling criteria, * * * interrelation of operations, common management, centralized control of labor relations, and common ownership * * *" are those "set out and elaborated in [those] Board decisions" this Court cited with approval in *Radio Union* v. *Broadcast Serv.*, 380 U.S. 255, 256-257. (Co. Pet. App. pp. 2a, 8a.)

After reviewing the facts in painstaking detail (Co. Pet. App. pp. 2a-8a, 13a-14a), fully analyzing the Board decisions cited in *Radio Union* (Co. Pet. App. pp. 8a-10a), and explaining the defects in the Board's cursory discussion of the record (compare Co. Pet. App. pp. 11a-15a with *Id.*, pp. 24a-25a), the Court of Appeals held "that the Board's finding that respondent Kiewit and South Prairie are separate employers for the purposes of the National Labor Relations Act is not warranted by the record" (Co. Pet. App. pp. 14a-15a). And, since "Kiewit and South Prairie are engaged in the same class of construction work in the same locality; and the Board gave no indication that, if a 'single employer' status obtained, it would have disagreed with the ALJ's conclusion that Kiewit and South Prairie employees constitute an appropriate unit for collective bargaining purposes," the Court of Appeals held also "that the Board erred in finding that Kiewit and South Prairie had no obligation to recognize Local 627 as the bargaining representative of South Prairie's employees or to extend the terms of

the Union's agreement with Kiewit to South Prairie's employees." (Co. Pet. App. pp. 16a, 19a-20a.)

Judge Tamm dissented on the ground that "vacation of the Board's order * * * resulted from a factual disagreement between" the Court of Appeals majority and the Board. He emphasized that there was "no dispute in this case regarding the applicable legal standard" and that the "controversy" within the lower court was "simply over the application of those indicia of control to this factual context." Indeed he further narrowed that "controversy" by expressing his own doubts as to the Board's ruling: "Were we deciding this case de novo, I might agree with the majority." (Co. Pet. App. pp. 20a-21a.)

3. *The Contention That The Court of Appeals Erred By Rejecting the Board's Finding That Kiewit And South Prairie Are Not A Single Employer* (Co. Pet. pp. 10-12; Bd. Pet. pp. 12-16) *Is Insubstantial.* In *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 173-174, the most recent decision on this point, this Court affirmed once again that unless a "Court of Appeals [can] be said to have 'misapprehended or grossly misapplied' the governing standard" stated in *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, for determining whether Board findings are supported by substantial evidence, "there is no justification for this Court's intervention, since *Universal Camera* precludes us from substituting our judgment for that of the Court of Appeals. 'This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ', *NLRB* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 503 (1951); see *Central Hardware Co.* v. *NLRB,* 407 U.S. 539, 548 (1972)."

The petitioners have not come close to meeting this heavy burden of persuasion. The court below did not misapprehend or misapply the *Universal Camera* standard; rather, its decision is responsive to Mr. Justice Frankfurter's admonition that "reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." (*Universal Camera,* 340 U.S. at 490.)

The Board stated in two paragraphs reproduced at Co. Pet. App. pp. 24a-25a, the basis for its conclusion that applying the *Radio Union* criteria to the facts here, Kiewit and South Prairie are separate employers for the purposes of the Act. That statement shows that "common ownership" is undisputed. As the Court of Appeals noted, the Board decision "did not refer to the criteria of interrelation of operations and common management". (Co. Pet. App. p. 13a.) While the Board did refer to isolated facts tending to "indicate an absence of interrelation of operations or common management", the agency did not "even comment upon * * * the facts and circumstances [that] evidence a substantial qualitative degree of interrelation of operations and common management". (Co. Pet. App. pp. 13a-14a.) The Court of Appeals inquiry into the contrary evidence was quite proper, for the very point of the *Universal Camera* standard is to assure that the courts do not "determine the substantiality of evidence supporting a Labor Board deci-

sion merely on the basis of evidence which in and of itself justified it without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." (340 U.S. at 487.)

Finally, the Board's decision implies that the "common control of labor relations policies" criteria was not satisfied here because Kiewit, Inc. and Kiewit had not exercised their undisputed right to control South Prairie's labor relations policies. (Co. Pet. App. pp. 24a-25a.) The Court of Appeals pointed out that "the parent company, Kiewit, Inc., and its wholly-owned subsidiary, Kiewit, decided that South Prairie would operate on a non-union basis in Oklahoma" and that this "constitutes a very substantial qualitative degree of centralized control of labor relations". (Co. Pet. App. pp. 11a, 12a.) That being so, the court below recognized that the Board, without acknowledgment or justification, had departed from the rule stated in *Sakrete of Northern California, Inc.* v. *NLRB,* 332 F.2d 902 (C.A. 9), *cert. denied,* 379 U.S. 961, one of the cases cited with approval in *Radio Union.* There the Ninth Circuit had stated:

> "even if the substantial evidence shows interrelationship of operations, centralized control of labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the 'single employer' concept;"

and had pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control." (332 F.2d, at 907.) The Court of Appeals therefore concluded that this portion

of the Board's decision was as defective as the remainder.

In sum, the Court of Appeals, like the Board's Administrative Law Judge, simply concluded that when all of the evidence was considered in light of the criteria stated by this Court in *Radio Union,* the only conclusion they could conscientiously reach was that Kiewit and South Prairie are a single employer for purposes of the Act. That was not error at all, much less the plain error required to justify this Court's intervention into a factual dispute.

4. *The Contention That The Court of Appeals Erred By Reversing The Board's Dismissal Of The Complaint* (Co. Pet. pp. 9-12; Bd. Pet. pp. 13-16) *Is Belied By The Rationale Of The Board's Decision.* In a "single employer" case there are potentially two issues: Are the nominally separate entities a single employer? If so, do their employees constitute a single bargaining unit? Thus, as the Board noted, citing *Central New Mexico Chapter,* 152 NLRB 1604, where there are differences between the work done by one entity and the other, a "single employer" finding does not mean that it is appropriate to extend a collective bargaining agreement with one entity to the other. (Co. Pet. App. pp. 23a-24a.) But, as the Board also recognized, where, as here, both entities are doing the same work in the same place, a "company which has not agreed to be bound by the collective bargaining agreement of another company may neverthless be held to that contract if it * * * may be said to constitute a single employer with that company." (Co. Pet. App. p. 24a.) Under these circumstances, as the Board itself said, "South Prairie's potential liability under the Kiewit contract therefore must turn on the issue of

whether the two companies constitute a single employer for collective bargaining purposes." (Co. Pet. App. p. 24a.) In other words, in this case the two potential issues are necessarily fused into one, and the sole factor determining liability is "whether the two companies constitute a single employer for collective bargaining purposes."

The Court of Appeals understood the Board's decision as stating that once it was determined that South Prairie and Kiewit are a single employer, the conclusion that the Kiewit contract applies to South Prairie follows ineluctably:

> "Here Kiewit and South Prairie are engaged in the same class of construction work in the same locality; and the Board gave no indication that, if a "single employer" status obtained, it would have disagreed with the ALJ's conclusion that Kiewit and South Prairie employees constitute an appropriate unit for collective bargaining purposes." (Co. Pet. App. p. 16a.)

The foregoing analysis of the Board's decision shows the Court of Appeals' understanding to be fully justified.

Thus, on the premises of the Board's own decision, this case, unlike *NLRB* v. *Food Store Employees,* 417 U.S. 1, relied on by petitioners, *does* "present the exceptional situation in which crystal clear Board error renders a remand an unnecessary formality." (*Id.* at 8.)

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

MICHAEL FANNING
1125 Seventeenth Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Local 627, IUOE

see

7 5

1 2 4 3